

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

FRESNO UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2012110106

**DECISION**

Charles Marson, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on April 9 and 10, 2013, in Fresno, California.

Sang-Jin Nam and Melody A. Hawkins, Attorneys at Law, represented the Fresno Unified School District (District). Debi Clark-Fleming, the District's Legal Compliance Coordinator, was present throughout the hearing on behalf of the District.

Student was represented by Mother, who was accompanied by Father, on the morning of April 9, 2013. Student was not present. A Spanish interpreter was present to assist Father during the hearing. During preliminary rulings on pending motions, Mother announced that Parents would no longer participate in the hearing.<sup>1</sup> Parents then left the hearing room and did not return.

The District filed a request for a due process hearing (complaint) on November 1, 2012. At Parents' request the matter was continued on November 26, 2012. At hearing, oral and documentary evidence were received. At the close of the hearing, the matter was continued to May 6, 2013, for the submission of closing briefs.<sup>2</sup> On that day, the record was closed and the matter was submitted for decision.

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<sup>1</sup> The preliminary rulings involved the potential preclusive effect of a previous OAH decision; the timing of a possible visit to the site of the District's proposed placement; and the admissibility of evidence that Parents had failed to disclose to the District five business days before the hearing pursuant to Education Code section 56505, subdivision (e)(7).

<sup>2</sup> The District's closing brief has been filed as District's Exhibit D53. Parents did not file a closing brief.

## ISSUES

1. May the District perform Student's triennial assessment in all areas identified in its Assessment Plan/Consent for Assessment, most recently presented at Student's February 15, 2012 individualized education program (IEP) team meeting, without the consent of Parent?

2. Did the District's proposed annual goals, placement, and services contained in Student's February 15, 2012 IEP, offer Student a free appropriate public education (FAPE) in the least restrictive environment (LRE) such that District may implement them without parental consent?

3. May the District terminate the provision of Student's special education and related services as provided in his October/November 2007 IEP due to Parent's failure to allow Student to attend the Adult Transition Program (ATP) at the Instructional Media Center (IMC)?

## CONTENTIONS

The District contends that circumstances warrant a comprehensive assessment of Student, since it conducted the last comprehensive assessment in 2002, and the absence of current information makes the provision of a FAPE to Student difficult. It contends that, insofar as Student's current needs can be determined, its IEP offer of February 15, 2012, which would place Student in an independent living skills program in the ATP at the IMC in Fresno, constitutes the offer of a FAPE in the LRE. Finally, it contends that due to parental lack of cooperation and obstruction, it should be allowed to terminate Student's special education and related services unless Parents cooperate with the triennial assessment process.

Student's contentions are difficult to discern, as Parents declined to participate in most of the hearing. From their brief participation at the beginning of the hearing, and from pleadings they filed before the hearing, it appears that Parents contend that Student should be assessed only on conditions they propose, including re-enrollment in Fresno High School (FHS), from which Student graduated in 2011; that placement for a fifth year in FHS is the only appropriate placement for him; and that the District's proposed placement at the ATP would not provide Student a FAPE because the ATP lacks adequate physical facilities and is not the LRE for Student.

## FACTUAL FINDINGS

### *Background and Jurisdiction*

1. Student is a 21-year old man who lives with Parents within the geographical boundaries of the District. Mother holds his educational rights. He is eligible for special

education and related services primarily due to autistic-like behaviors and secondarily due to intellectual disability. He is friendly and well-behaved and enjoys social interaction, but cannot read, has a limited vocabulary, and has few functional skills.

2. The last comprehensive assessment of Student's needs and abilities was conducted in 2002. Starting in approximately 2005 and frequently since, the District has proposed to Parents numerous plans for a new comprehensive assessment of Student to determine his present levels of educational performance and functional skills. However, Parents have refused to authorize any such assessments.<sup>3</sup>

3. Student's last agreed-upon and implemented IEP was written in fall 2007, during his ninth grade at FHS. The 2007 IEP provided that Student would attend four special education classes and two general education classes. It provided Student five related services: a one-to-one aide; occupational therapy (OT) for 30 minutes a month; speech and language (S/L) therapy for 60 minutes a week, adaptive physical education (APE) for 20 minutes a month; and transportation to and from school with an aide. The 2007 IEP also provided that Student would graduate from high school with a certificate of completion, not a regular education diploma. The members of the IEP team, including Parents, acknowledged at the time that Student did not have the cognitive ability to complete the graduation requirements for a regular diploma. Student's educational program would therefore focus on functional life skills rather than diploma-track academics. Parents agreed to the 2007 IEP, including its provision for graduation with a certificate of completion.

4. At an IEP team meeting on April 26, 2011, in the spring of Student's senior year, the District offered to enroll Student after graduation in its ATP at its IMC, where he would learn functional skills useful in his transition to adult life. It continued to request that Mother allow a comprehensive assessment of Student, but in the absence of that assessment it declined to include in its IEP offer the five related services from the 2007 IEP, because it believed that Student no longer required them. Mother declined to authorize an assessment and disagreed with the proposed placement. She proposed instead that Student attend a fifth year at FHS, take diploma-track courses, and graduate with a regular education diploma. The parties could not agree on an IEP for the following school year. Since Student had accumulated the 230 credits required for graduation, the District graduated him in June 2011 and sent him a certificate of completion, even though Mother did not permit him to attend the graduation ceremony. Since he had not received a regular education diploma, he remained eligible for special education and related services until his 22d birthday.

5. At an IEP meeting on February 15, 2012, the District again offered Student placement in the life skills program at ATP, and again proposed a comprehensive assessment. Mother again declined the offer and the assessment. Parents then requested a due process hearing before OAH, raising a variety of contentions, including that the District

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<sup>3</sup> Parents apparently did authorize a functional behavior assessment in early 2008 and agreed to the implementation of a behavior plan. On this record, that is the only assessment of Student conducted since 2002.

had improperly graduated Student; that it should have placed him in diploma-track courses in a fifth year at FHS; that it unlawfully predetermined its offer of placement at ATP; and that it had engaged in harassment and intimidation of Parents. (*Student v. Fresno Unified School Dist.* (2012) Cal.Offc.Admin.Hrngs. Case No. 2012020778 [the 2012 Decision].)<sup>4</sup>

6. After a hearing, ALJ Peter Paul Castillo ruled on August 9, 2012, that Student had properly graduated from FHS with a certificate of completion pursuant to his IEP; that Parents had failed to establish that Student had the cognitive capacity to obtain a regular high school diploma; that the District's IEP offers of placement at ATP were not predetermined; and that the District had not harassed and intimidated Parents.

7. However, Judge Castillo also ruled that the District had denied Student a FAPE because in one respect it had interfered with Parents' right to participate in the decisional process regarding Student's educational program. Instead of seeking an order from an ALJ that it could assess Student without parental consent, the District informed Mother that if she did not consent to a comprehensive assessment of Student, the District would unilaterally withdraw the five related services from the 2007 IEP if Student enrolled after graduation in the ATP. Judge Castillo ordered the District to provide those related services if Student attended the ATP unless relieved of that obligation by an ALJ after a subsequent due process hearing, and awarded Student compensatory education in the form of an additional year of special education services and instruction, to cease at his 23d birthday.

8. In compliance with the 2012 Decision, the District arranged to provide to Student the five related services in his 2007 IEP upon his enrollment in the ATP, with or without a comprehensive assessment, and since the 2012 Decision has at all times been prepared to provide those services. The District also filed the instant request for a due process hearing. Student attended half a day of summer school in 2011, but otherwise Parents have not enrolled him in the ATP or any other school and he has had no instruction since that time.

#### *The Need for a Comprehensive Assessment*

9. An ALJ may authorize a district to reassess a special education student without parental consent if the educational or related services needs of the child warrant a reevaluation. The evidence at hearing conclusively established that circumstances warrant a new comprehensive assessment of Student.

10. By its assessment plan of February 15, 2012, the District proposes a comprehensive assessment plan of Student that will include academic achievement, health, intellectual development, language and speech communication, motor development, adaptive behavior, and autism. The plan identifies by title the assessors who will execute it, is in

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<sup>4</sup> Official notice is taken of the 2012 Decision.

understandable language and is in the primary language of Student and Mother.<sup>5</sup> It complies with the statutory requirements for an assessment plan, and was repeatedly presented to Mother along with a notice of procedural rights under the IDEA. The assessment plan is substantially the same as previous assessment plans presented to Mother on April 26, May 24, June 18, and September 17, 2011. Mother has had several opportunities of 15 days and more to approve one of those plans, including the February 15, 2012 plan, and has declined to do so.

11. Annual goals are a critical part of a student's IEP. They must set forth the student's present levels of educational performance (PLEP's), and starting from those levels must propose a method by which the student may attain a reasonable amount of progress in the coming year. To that end, annual goals must be measurable, and measurement begins with accurate PLEP's. Accurate PLEP's, in turn, are based in important part on current assessment data. For that reason the Individuals with Disabilities in Education Act (IDEA) requires the periodic assessment of special education students, including comprehensive assessments every three years.

12. The absence of current comprehensive assessment data on Student has seriously degraded the District's efforts to provide him a FAPE. The District has been forced to propose annual IEP goals based primarily on information from teacher and staff observations. Several District witnesses testified that the formulation of proper goals for Student has been greatly hampered by the lack of current assessment data. For example, in 2011 school psychologist Christie Gunter began to discuss Student's transitional needs with Parents.<sup>6</sup> She testified it was "pretty difficult" to write appropriate goals and objectives and determine appropriate services for Student in the absence of current assessment data. The notes of an IEP team meeting on June 8, 2011, state that the District was requesting assessments for the third time "to determine current present levels to help plan . . . post secondary goals and objectives." Ms. Gunter was particularly interested in assessments to determine whether the five related services in Student's 2007 were still needed, but she could not do so without new assessments. After the June 2011 IEP team meeting, Ms. Gunter wrote to Mother, stating that Student's PLEP's and his speech and language, OT and APE goals and objectives, "are not accurate and may not be reflective of his current skills." Mother continued to decline the District's repeated requests for permission to conduct comprehensive assessments.

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<sup>5</sup> Student's primary language is English. Mother is bilingual in English and Spanish. Father speaks Spanish.

<sup>6</sup> Ms. Gunter has a master's degree in school psychology and a school psychology credential, and is a state-licensed educational psychologist. She has worked for the District for 20 years, first as a school psychologist and then as a Regional Instructional Manager (RIM). She is responsible, among other things, for supervising special education placements, including transition planning. She knows Student because she was the RIM for FHS during the four years he attended there.

13. Several of the PLEP's and goals in the District's February 2012 IEP offer reflect an unavoidable lack of specific information and are hedged with the statement that they are based in part on obsolete assessment data. Student is reported to be able to write "legibly," but letter formation, size, spacing, and alignment present a "challenge requiring max verbal and visual cues at times." No information on motor skills is provided. Student could "write his name and some basic personal information" and is "able to follow a routine, daily schedule." But more specific measurements are not included because no current assessment data support them.

14. In the absence of current assessment information, a dispute has festered for years between the parties concerning Student's capacity, or lack of it, to take diploma-track courses and receive a regular education diploma. That dispute was not resolved until the 2012 Decision.

15. As far as can be determined, Mother does not deny that Student needs newer assessments. Instead, she has used her ability to decline assessments as part of her attempts to extract concessions from the District. For example, the notes of the February 15, 2012 IEP team meeting state that Mother responded to repeated requests for reassessment by stating that she would "love to see what [Student's] current levels [of performance] are, but wants it done after [Student] goes back to Fresno High." And in a prehearing conference statement in this matter, Mother again sought to condition new assessments on Student's temporary re-enrollment in FHS.

16. For the reasons above, the District proved that circumstances warrant a new comprehensive assessment of Student. The District will therefore be permitted to proceed with the February 15, 2012 assessment plan without parental consent.

#### *Validity of the February 15, 2012 IEP Offer*

17. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. Second, the tribunal must decide whether the IEP was designed to meet the child's unique needs, and was reasonably calculated to enable him to receive educational benefit. The reasonableness of an IEP is evaluated in light of the information available at the time it was implemented.

#### *Procedural Compliance*

18. A school district must afford the parents of a child with a disability the opportunity to participate meaningfully in the formulation of the child's IEP. It must notify parents of an IEP team meeting early enough to arrange a mutually convenient date and must ensure that they will have an opportunity to attend. It must take steps to ensure that all other required IEP team members attend the meeting, and that parents have an adequate opportunity to participate in the meeting and to present information to the IEP team. It may not arrive at the meeting with an offer that has been predetermined.

19. An IEP team must include, in addition to parents, at least one regular education teacher of the student (if the student may be placed in general education); one special education teacher of the student (or, where appropriate, a special education provider); a representative of the local educational agency; an individual who can interpret the instructional implications of assessment results; and other individuals invited at the discretion of the parent or the district who have knowledge or special expertise regarding the student.

20. The February 15, 2012 IEP team meeting was the last of several meetings scheduled by the District to consider Student's post-graduation placement. Parents had not attended previously arranged meetings. Parents were properly notified of the meeting on January 20, 2012, and were given a copy of their procedural rights. The meeting was led by Nicole Evangelinos as the District's administrator.<sup>7</sup> Ms. Evangelinos established in her testimony that Mother, Father and Student attended and participated in the meeting, although they refused to sign even the portion of the IEP stating that they attended. They were also accompanied by Patrick Sigola, an educational advocate. A Spanish interpreter was present to assist Father.

21. The February 15, 2012 IEP team meeting was also attended by Marjie Hinojosa, Student's paraeducator (one-to-one aide), and Kathy Hernandez and Julie Smith, both teachers at the ATP. Since Student had graduated from FHS, placement in the ATP was not only the natural progression of his program; it was also part of his stay put placement as held in the 2012 Decision. The teachers at the ATP were therefore his current teachers for the purpose of the meeting. There was no need for the presence of a general education teacher because there was no prospect Student would be placed in general education, and no need for the presence of someone to interpret assessment results because there were no results to interpret. The evidence thus showed that all IEP team members required by law were present at the February 15, 2012 meeting at which the disputed IEP was crafted.

22. The 2012 Decision established that the District's offer of placement in the ATP was not pre-decided. Judge Castillo found that, at the February 15, 2012 IEP team meeting, Parents "refused any meaningful discussion about Student attending an ATP, as they continued to insist that Student return to FHS." (2012 Decision, Finding of Fact 40.) He also found that "[t]he District representatives listened to Parents' request and tried to explain the appropriateness of their continued offer for Student . . . [but] Mother's response was threatening to sue individual District meeting attendees." (*Ibid.*)

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<sup>7</sup> Ms. Evangelinos received a bachelor's degree in liberal studies and her multiple studies credential from California State University (CSU) at Fresno in the 1980's and worked for two years in Los Angeles as a resource program specialist. She then obtained a master's degree from CSU Dominguez Hills, as well as administrative and instructional specialist credentials. She taught a special day class (SDC) in the District for approximately three years and has been a RIM for 14 years. Among her duties is insuring the proper placement of special education students.

23. Additional testimony at this hearing confirmed that Parents participated extensively in the meeting, and that District team members considered Parents' views and did their best to discuss the District's offer. ATP teacher Kathy Hernandez established that it was difficult to present the District's offer to Parents, but the District team members attempted to do so.<sup>8</sup> Mother continually insisted on Student's reenrollment in FHS, and was threatening and confrontational with team members. The notes of the meeting show that Mother, Father, and their advocate each individually addressed the team and expressed views. The testimony of Ms. Hernandez and Ms. Evangelinos left no doubt that Mother participated as fully as she desired in the meeting. The meeting lasted for more than an hour. Both the notes and an audio recording of the meeting confirm the descriptions of the meeting given by District team members.

24. The evidence thus showed that the February 15, 2012 IEP offer is the product of an IEP team meeting that was properly noticed, held, and staffed, and in which Parents vigorously participated. Federal and State law require that a valid IEP contain numerous specific statements and findings. The offered IEP contains all the statements and findings the law requires. The District therefore complied with all the procedural requirements of federal and State law in developing and presenting the February 15, 2012 IEP offer.

25. In the alternative, any procedural error the District might have made in the formulation or presentation of the February 15, 2012 IEP offer was harmless. A procedural violation of the IDEA and related laws results in a denial of a FAPE only if it impedes the student's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their child, or causes a deprivation of educational benefits. Nothing in the record shows that the procedures by which the IEP was developed or presented caused any loss to Student's education or Parents' participatory rights. On the contrary, Parents were so dedicated to Student's re-enrollment in FHS and so unwilling to listen to any other proposal that no procedural defect the formulation or presentation of the February 15, 2012 IEP would have made any difference to their procedural rights or to Student's education.

#### *Substantive Validity*

26. An IEP must adequately address a student's unique needs and must be reasonably calculated to enable him to receive educational benefit. In addition, when a

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<sup>8</sup> Ms. Hernandez received a master's in special education from CSU Fresno in 1998, as well as multiple subject, learning handicapped and severely handicapped credentials. She has worked for the District for 11 years in adult transition programs, largely teaching functional skills, and has been a special education teacher at the ATP for the last three years. Before that she worked for the Fresno County Office of Education for seven years, teaching functional skills to severely handicapped children, and for three years taught a regular education class at the Bakersfield Unified School District.



student approaches the age of 16, his IEP must contain adequate planning and provision for his transition to adult life and the acquisition of independence for that transition.

### *Student's Needs*

27. Even in the absence of current assessment information, the general nature of Student's needs is clear. The evidence showed that his program is best focused on the acquisition of functional life skills rather than academic knowledge. Kristine Splan, the District's school psychologist assigned to FHS, has known Student since the ninth grade.<sup>9</sup> She established that Student still lacks a wide range of skills necessary for adult life. At age 21 he cannot read or use spontaneous language beyond such statements as "yes" and "no." His functional IQ is somewhere between 50 and 60. He cannot cook, make a purchase, make change, ride a bus, or apply for a job.<sup>10</sup> At his 23d birthday he will no longer enjoy the protections of special education and will need to know how to live in the adult community on his own. His needs at present are for the development of functional life skills.

### *Goals and Objectives*

28. The six goals in the District's February 15, 2012 IEP address social skills, basic math functions, basic reading, basic writing, increased independence, and vocational training. They all suffer from the absence of current assessment data, but they reflect a reasonable and good faith effort by the District to use teacher observations and testing as substitutes for determining baselines and measuring progress. Student's math goal, for example, states that Student can add and subtract single digit numbers by himself, and can add and subtract double digit numbers with the help of a calculator. Starting from that baseline, the goal would require him, over the next year, to demonstrate improvement in his community purchasing skills with 80 percent accuracy in 4 of 5 trials as measured by teacher observation and charting. The goal would be measurable if his current community purchasing skills were quantified, but the absence of current assessment data on his functional skills made that impossible. The District made similar efforts to quantify baselines in the goals for basic reading, social skills, basic writing, and increased independence, which lack full measurability for the same reasons.

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<sup>9</sup> Ms. Splan received a master's degree in special education from CSU Fresno in 1981, and since then has acquired general and special education credentials and a pupil personnel credential with an emphasis on school psychology. She also has certificates of competency as a resource program specialist and in English language development. She has worked for the District for 33 years, as a resource specialist, an SDC teacher, and since 2000 as a school psychologist.

<sup>10</sup> It is not known how well Student deals with matters such as personal hygiene and dressing, as Parents have been unwilling to complete functional skills questionnaires in those areas.

29. The District improved the measurability of Student's goals when feasible by implementing them with objectives that anticipate training in independent living skills at the ATP. The objectives in the writing goal, for example, would require Student to complete an application form, using a "cheat sheet" but without teacher support, with increasing accuracy over the year as measured by teacher observation or testing. The objectives in the math goal would require increasing accuracy in determining prices of objects by comparison shopping and in using a calculator and a shopping list. The objectives in the independence goal would extend his ability to ride city bus lines and access bus schedules, respond to teacher instructions and cues, and advocate for himself at a worksite and during class trips on and off campus. The objectives in the reading goal would require him to demonstrate increasing skill in locating particular sections of newspapers, determining route and time information for public transportation, and locating businesses in the telephone book.

30. The February 15, 2012 IEP also sets forth three transition goals addressing training, education, employment, and independent living skills. They require that Student improve his independent living skills, acquire work experience, experience mobility training, and learn to travel to business and employment settings. They are linked to the annual goals described above and display the same good faith effort by the District to write measurable goals in the absence of any recent assessment data on functional skills.

31. The adequacy of an IEP must be measured in light of the information available to the IEP team that wrote it. These goals and objectives are not ideal in their measurability or level of detail, but in the context of this case, and in the absence of any current assessment data that would permit a finer focus, they are generally as measurable and detailed as circumstances now permit. On this record they are therefore adequate and appropriate, and represent the District's best efforts under the circumstances.

#### *The District's Offer of Placement in the ATP*

32. The evidence showed that the ATP at IMC concentrates on the teaching of the independent living skills Student needs. Julie Smith, a special education teacher and case manager at the ATP, testified extensively about the nature of the instruction and activities the ATP offers.<sup>11</sup> Ms. Splan is also familiar with the ATP and described its activities. Their descriptions of the program not only established its suitability for Student; they also showed why placement in the ATP would maximize Student's exposure to the adults in the community who are now his typical peers, and therefore would place him in the LRE.

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<sup>11</sup> Ms. Smith has a master's degree in educational administration leadership in CSU Fresno. She has clear multiple subject and moderate/severe teaching credentials, and a clear administrative and leadership credential. She has been an educator since 1992, primarily as a teacher of functional skills in the District's elementary and high schools. She has also been a RIM for the District.

33. The students at the ATP are usually severely disabled. Like Student, their IQs are somewhere near 55 and their needs are for the skills of independent living. The ATP has a high ratio of adults to students. At present there are about 45 students in the program, with 15 adults to assist and supervise them. There are three teachers, each with four aides.

34. On Monday and Wednesday mornings, ATP students visit Workability sites.<sup>12</sup> Ms. Smith frequently takes students to the Goodwill, where her students change into work clothes and arrange items for merchandizing. Sometimes they engage in janitorial work at the American Legion Hall, or set up chairs and tables for events there.<sup>13</sup> Other Workability sites include retail stores, at which students clean, stack and sort merchandise, and practice basic job skills and interaction with customers. Ms. Splan explained that one of the many values of the Workability program is that students learn to feel like adults as they earn a paycheck in the real world.

35. On Monday and Wednesday afternoons, ATP students study functional academics: they learn to cook safely, budget money, find things on computers, read newspaper articles and acquire health and safety skills. They learn the basic methods of personal hygiene and how to dress for work. They learn how to identify coins and make change, how to tell time, and how to do laundry. They study appropriate behavior in the workplace and how to use a telephone. They learn mobility skills ranging from the safe crossing of the street to reading a bus schedule, dealing with late buses, and getting to important places, such as the workplace or the regional center.

36. On Tuesdays, Ms. Smith leads ATP students in physical activities, frequently in community locations, such as public parks. She has her students ride bicycles, use stair steppers or treadmills, exercise with Zumba videos or just walk. She attempts to select activities done by typical adults. In the afternoon students pursue electives such as upholstery, gardening, photography, drawing or other activities determined by their individual interests. Students also participate from time to time in larger community programs such as the Special Olympics.

37. On Thursday mornings, Ms. Smith organizes sports such as basketball or kickball in public parks. She also fosters self-advocacy skills, so that students can deal with demands made by strangers. She teaches community awareness, sometimes by inviting

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<sup>12</sup> The Superintendent of Public Instruction funds and oversees Project Workability, a program established by statute that is intended to provide special education students, during their transitions, with multiple employment options, adequate information for choosing a job or career path, and a variety of vocational experiences. Local educational agencies and counties operate Workability programs in which disabled students are placed with local employers to obtain real-world job experience. (See Ed. Code, §§ 56470-56474.)

<sup>13</sup> According to notes in the February 15, 2012 IEP, Mother told the IEP team that Student is interested in being trained in maintenance and custodial work.

speakers on domestic violence or police officers who explain the dangers of abuse of the disabled and the legal protections that apply.

38. On Fridays, Ms. Smith's students go out into the community to practice the skills they learned during the week. They purchase things in retail stores and practice counting change. They may visit a mall, attend a fair, or a home and garden show, and practice social skills. Ms. Smith aims at including her students in activities that mix them with adults in the community and allow them to learn to move around the area on their own.

39. Ms. Splan, Ms. Smith, Ms. Evangelinos and Ms. Hernandez all persuasively testified that Student would fit well in the student population at the ATP; that it is an appropriate post-graduation placement for him; and that he would derive educational benefit from it. The evidence of the nature of Student's needs and the instruction offered at the ATP confirmed that view.

#### *Accommodations and Modifications*

40. An annual IEP is required to contain a statement of supplementary aids and program modifications that will be provided to enable the student to advance appropriately toward attaining his annual goals, to be involved in and make progress in the general education curriculum, and to participate in extracurricular and other nonacademic activities.

41. The February 15, 2012 IEP offer contains several accommodations and modifications based on Student's needs as observed by the District's teachers and staff. It provides for use of a calculator, access to a computer on campus, breaks between assignments, visual reminders, the visual presentation of single tasks at a time, the repeating of instructions, and checks for understanding. Student is in good health, has adequate sight and hearing, and has no need for assistive technology.

42. Nothing in the record showed that Student needs any accommodations and modifications other than those provided. The accommodations and modifications in the IEP are adequate and appropriate.

#### *Related Services*

43. An annual IEP is required to contain a statement of related services that will be provided to enable the child to advance appropriately toward attaining his annual goals, to be involved in and make progress in the general education curriculum, and to participate in extracurricular and other nonacademic activities. Related services include such matters as transportation, occupational therapy, counseling, and the like.

44. As noted above, Student's 2007 IEP provided five related services: a one-to-one aide; OT for 30 minutes a month; S/L therapy for 60 minutes a week; APE for 20 minutes a month; and transportation to and from school with an aide. The District removed

those related services from the February 15, 2012 IEP offer because they were either not needed at the ATP or otherwise provided in its program.

45. There are no one-to-one aides at the ATP, although many students there used to have one. Ms. Smith and Ms. Gunter testified persuasively that there are so many adults assisting students in the program (one adult for every three students) that no student needs an individual aide. More importantly, for adults in an independent living skills program a one-to-one aide would be damaging rather than helpful, because the central purpose of the program is to teach independence, and reliance on an aide undercuts that purpose. Both witnesses stressed that as soon as their students leave the program they will have to live in the community without aides, and they need to learn to do that in the ATP. They established that Student would not need a one-to-one aide in the ATP.

46. Ms. Turner established that Student no longer needs OT. Based on her classroom observations in 2011, he has all the OT skills he needs to access the curriculum at the ATP. He does not have neuromuscular, range of motion, postural, sensory, or fine or gross motor problems. In the course of providing therapy to him in 2011, Ms. Turner realized that he had reached a plateau; he had improved his skills as far as they could be improved given his cognitive limitations, and has reached the skill level he will retain for life. She also pointed out that the teachers in the ATP teach and have students practice OT-related motor skills every school day. Ms. Turner established that Student would not need the related service of OT to progress in the ATP.

47. Deborah Kludjian is the speech and language therapist who provided two 30-minute sessions a week of S/L services to Student in the 2010-2011 school year. She testified by declaration for medical reasons. She established that Student had also reached a plateau in his expressive and receptive speech and had progressed to the limits of his ability. She is familiar with the nature of the ATP and testified that its teachers focus on the daily use of expressive and receptive language as part of their teaching of functional skills. Student has reached the level of skill at which he is better served by working in the collaborative environment of the ATP rather than with a speech therapist. Ms. Kludjian established that Student would not need separate S/L therapy to access the ATP curriculum.

48. Danella Barnes is a teacher of adapted physical education (APE).<sup>14</sup> Student was on her caseload at FHS from 2009 until his graduation in 2011. He participated fully in her Universal Access PE class and enjoyed it. Ms. Barnes testified that Student has progressed as far as he is going to in his physical development and has reached the level of physical skills that he will have for life. She also testified that she is familiar with the ATP

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<sup>14</sup> Ms. Barnes has a single-subject teaching credential with an emphasis in APE. She has a cross-cultural language and academic development (CLAD) certificate and an administrative services certificate of eligibility. She has taught APE for the District for more than three years. Before that she taught APE for 21 years at the Sanger Unified School District. She is on the adjunct faculty of the Kinesthesiology Department of CSU Fresno, where she instructs future APE teachers.

and has observed its activities, and is confident he can receive benefit there. She established that Student does not need APE to access the ATP curriculum.

49. Student will need transportation to and from school to attend the ATP. That transportation is built into the ATP. The ATP has a long-standing and successful relationship with Handy Ride, the door-to-door bus service for the disabled operated by Fresno's city bus system. A Handy Ride bus or van comes to an ATP student's door to pick him up, and then drops students off at the ATP in groups of about five. After school Handy Ride buses take the students home. Instruction and practice in the use of Handy Ride by ATP students is an integral part of ATP's mobility training. Ms. Hernandez established that it is a valuable way to provide transportation for ATP students; it makes them feel more independent because they are no longer riding the District's yellow bus, but are using public transportation instead.

50. The evidence showed that Student no longer needs related services in his IEP. He has long since reached his adult skill levels in motor activity, speech, and physical education. He does not need a one-to-one aide at the ATP because the adult staff there would assist him as required and because he needs to acquire independence from an aide. Through Handy Ride the ATP offers adequate transportation. The evidence did not show that Student needed any other related service. It showed that he has all the skills required to access the curriculum at the ATP with the assistance of its staff.

#### *Physical Facilities*

51. Ms. Hernandez testified that the ATP at the IMC is housed in four buildings formerly used for in-service teacher training. Each building has ramps for wheelchairs and has two clean bathrooms. Each of the three teachers has his or her own classroom, and there is another large room for lunch and other activities. The facilities are in good condition and are conducive to skills training. To Ms. Hernandez' knowledge no ATP student has ever been injured at those facilities. Ms. Evangelinos confirmed that the facilities are useful for skills training and safe for students. The testimony of Ms. Hernandez and Ms. Evangelinos established that the ATP's physical facilities are adequate for teaching and safe.

#### *LRE*

52. The IDEA requires that a student with a disability be placed in the least restrictive environment in which he can be educated satisfactorily. The environment is least restrictive when it maximizes a student's opportunity to mix with typical peers. The LRE requirement applies to post-graduation transition placements.

53. Ms. Smith persuasively explained why Student's placement at the ATP would be in the LRE. Student's typically developing peers are now adults in the community. It would be pointless and impractical for nondisabled adults to participate in classroom training in life skills, and ATP students could not be satisfactorily trained in those skills while mixed with adults who did not need the training. But the premise of the ATP's instruction is that

those skills will be applied out in the community, so the structure of the program maximizes the exposure of its students to nondisabled adults. The basic method of the program is to teach a skill in class and then take students out in the community to practice it. Most of the many activities described above as part of the ATP's weekly routine deliberately mix ATP students with nondisabled adults, since the ATP's central purpose is to teach students to live among those adults when they leave the program. Ms. Smith's testimony therefore established that the ATP would maximize Student's exposure to nondisabled adults and is the LRE for him.

54. In sum, after considering the absence of current assessment data, all the evidence described above and Parents' arguments to the extent they are known, the preponderance of evidence showed that the goals, placement and services in the District's February 15, 2012 IEP offer would meet Student's needs related to his disability and are reasonably calculated to allow him to obtain a meaningful educational benefit. They offer Student a FAPE, and the District will be allowed to implement them.

#### *Requested Remedy of Termination of the District's Special Education Obligation*

55. The District originally requested an order relieving it of further obligation to provide special education and related services due to Parent's failure to allow Student to attend the ATP. Since a parent has the right to reject an IEP offer, that relief could not be granted. In recognition of that fact, during hearing and in its closing brief the District has refined its request so that it now seeks to be relieved of further special education obligation to Student only if Parents fail to produce him for triennial evaluation or fail to cooperate with that process.

56. A school district obligated to provide special education under the IDEA is entitled to current evaluation data. Parents who want their child to receive special education under the IDEA must allow a district to reassess the child every three years. Repeated refusal by a parent to produce a child for reevaluation relieves the district of the obligation to reevaluate him. A district may determine that a parent's failure to allow reevaluation, after being ordered by an ALJ to produce a student for reevaluation, constitutes a waiver of the student's right to special education and related services.

57. For several years Parents have refused to permit reevaluation of Student even though the District has presented numerous reassessment plans that comply with law and permitted Parents adequate time to respond. Parents do not dispute the need for reassessment, but continue to condition their permission on concessions they seek from the District.

58. Parents' conduct in dealing with the District in recent years has been obstructive and wasteful of District resources. Parents have refused without notice to appear at IEP team meetings, even if Parents themselves have requested the meeting. They have refused to respond to notices and requests from the District, and refused to complete and return necessary documents. They have photographed, recorded, yelled at and otherwise

harassed at least one District employee. They have conditioned cooperation with the District on concessions they have no right to extract. Their participation in the triennial assessment ordered by this Decision will therefore be regulated in detail.

59. If Parents refuse to produce Student for reassessment in compliance with the following Order, the District shall be relieved of any further obligation to provide special education and related services to Student. That duty shall only be revived if Parents unconditionally request a triennial evaluation pursuant to the February 15, 2012 assessment plan, cooperate with the process as required by the Order, and permit the triennial assessment to be completed. In that event Student will continue to receive, as compensatory education, special education and related services until his 23d birthday as ordered in the 2012 Decision.

## LEGAL CONCLUSIONS

### *Burden of Proof*

1. Because the District filed the request for due process hearing, it had the burden of proving the essential elements of its claim. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

### *Reassessment Without Parental Consent*

2. A district must reevaluate a student if it determines that the student's "educational or related services needs, including improved academic achievement and functional performance . . . warrant a reevaluation . . ." (34 C.F.R. § 300.303(a)(1) (2006).)<sup>15</sup>

3. To assess or reassess a student, a school district must provide proper notice to parents. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56381, subd. (a).) Proper notice consists of the proposed assessment plan and a copy of parental and procedural rights under the IDEA and state law. (Ed. Code, § 56321, subd. (a).) The assessment plan must be understandable, explain the assessments that the district proposes to conduct, and state that the district will not implement an IEP based on the assessment without the consent of the parents. (*Id.*, subds. (b)(1)-(4).) A school district must give the parents at least 15 days to review, sign and return the proposed assessment plan. (*Id.*, subd. (a).)

4. Parental consent is generally required before a school district can reassess a student. (20 U.S.C. § 1414(a)(1)(D)(i)(I), (D)(2)(a); Ed. Code, § 56381, subd. (f)(1).) If a parent does not consent to an initial assessment or a reassessment, the school District may, but is not required to, file a request for a due process hearing. (34 C.F.R. § 300.300(a)(3)(i)(2008); Ed. Code, §§ 56321, subd. (c)(2), 56581, subd. (f)(3).) A school

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<sup>15</sup> All subsequent references to the Code of Federal Regulations are to 2006 regulations unless otherwise stated.



district can overcome a lack of parental consent for an initial assessment or reassessment if it demonstrates the need for it at a due process hearing. (20 U.S.C. §§ 1414(a)(1)(D)(ii)(I); Ed. Code, §§ 56501, subd. (a)(3), 56506, subd. (e), 56321, subd. (c)(2); 56381, subd. (f)(3).)

*Issue No. 1: May the District perform Student's triennial assessment in all areas identified in its Assessment Plan/Consent for Assessment, most recently presented at Student's February 15, 2012 IEP team meeting, without the consent of Parent?*

5. Based on Factual Findings 1-16 and Legal Conclusions 1-4, the District may conduct the triennial assessment proposed in its February 15, 2012 Assessment Plan/Consent for Assessment without the consent of Parent. Student has not had a comprehensive assessment since 2002. Current assessment data are needed so that the parties can determine his PLEP's and write adequate annual goals and objectives. The absence of current assessment data has seriously degraded the ability of the District to offer or provide Student a FAPE and aggravated contentious relationships between the parties. Circumstances warrant a comprehensive reassessment without parental consent.

#### *Elements of a FAPE*

##### *Procedural Requirements*

6. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, at pp. 205-06.) However, a procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

##### *Parental Non-Cooperation*

7. The Supreme Court has noted that the IDEA assumes parents, as well as school districts, will cooperate in the IEP development process. (*Schaffer v. Weast, supra*, 546 U.S. at p. 53 [noting that "[t]he core of the [IDEA] ... is the cooperative process that it establishes between parents and schools"]; see also, *Patricia P. v. Bd. of Educ. of Oak Park* (7th Cir. 2000) 203 F.3d 462, 486; *Clyde K. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 35 F.3d 1396, 1400, fn. 5 [rejecting a "my way or the highway" approach by parents' attorney].) Parents who refuse to cooperate in a district's efforts to formulate an IEP are generally not entitled to relief. (See, e.g., *Loren F. v. Atlanta Indep. School Sys.* (11th Cir.2003) 349 F.3d 1309, 1312; *MM v. Sch. Dist. of Greenville Cty.* (4th Cir.2002) 303 F.3d 523, 535; *E.P. v. San Ramon Valley Unified School Dist.* (N.D.Cal., June 21, 2007, Case No. C05-01390) 2007 WL 1795747, pp. 10-11.). When parental non-cooperation obstructs the

process, courts usually hold that procedural violations do not deny the student a FAPE. (See *C.G. v. Five Town Community School Dist.* (1st Cir. 2008) 513 F.3d 279, 287-288.)

#### *Parental Participation in IEP Team Meetings*

8. Federal and State law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.)

9. A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP team meeting, expresses her disagreement with the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693.) A parent who has an opportunity to discuss a proposed IEP, and whose concerns are considered by the IEP team, has participated in the IEP development process in a meaningful way. (*Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036.)

#### *Predetermination*

10. A District may not predetermine its IEP offer. Predetermination occurs when an educational agency has decided on its offer prior to the IEP team meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.) A district may not arrive at an IEP team meeting with a "take it or leave it" offer. (*JG v. Douglas County School Dist., supra*, 552 F.3d at p. 801, fn. 10.)

#### *Required Attendance at IEP Team Meetings*

11. An IEP team must include at least one parent; a representative of the local educational agency; a regular education teacher of the child if the child is, or may be, participating in the regular education environment; a special education teacher or provider of the child; an individual who can interpret the instructional implications of assessment results; and other individuals who have knowledge or special expertise regarding the pupil, as invited at the discretion of the district or parents; and, when appropriate, the student. (20 U.S.C. § 1414(d)(1)(B)(i), (iv-vi); Ed. Code, § 56341, subds. (b)(1), (5-6).)

#### *Required Contents of an IEP*

12. Federal and State law specify in detail what an IEP must contain. (20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320; Ed. Code, § 56345.) An annual IEP must contain, among other things, a statement of the individual's present levels of academic achievement and functional performance, including the manner in which the disability of the individual

affects her involvement and progress in the regular education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320 (a)(1); Ed. Code, § 56345, subd. (a)(1).) The statement of PLEP's creates a baseline for designing educational programming and measuring a student's future progress toward annual goals.

13. An annual IEP must also contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).) For a student assessed using alternative assessments aligned to alternative achievement standards (like Student), the goals must be broken down into objectives. (20 USC § 1414 (d)(1)(A)(i)(I)(cc).)

14. In addition, the IEP's statement of goals must include "appropriate objective criteria, evaluation procedures, and schedules for determining, on at least an annual basis, whether the annual goals are being achieved," and a statement of how the student's progress toward the goals will be measured. (Ed. Code, § 56345, subd. (7), (9); 20 U.S.C. § 1414(d)(1)(A)(i)(III).)

15. An IEP must also contain a statement of the program modifications or supports that will be provided for the student to advance appropriately toward attaining his annual goals, and to be involved in and make progress in the regular education curriculum; and a statement of any individual accommodations that are necessary to measure the student's academic achievement and functional performance. (20 U.S.C. § 1414(d)(1)(A)(i)(IV), (VI)(aa); Ed. Code, § 56345, subds. (a)(4), (6)(A).)

16. Beginning not later than the first IEP to be in effect when a child with a disability turns 16, and updated annually thereafter, the IEP must also include appropriate measurable postsecondary goals related to training, education, employment, and, where appropriate, independent living skills. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa)-(bb); 34 C.F.R. § 300.320(b) (2006); Ed. Code, § 56345, subd. (a)(8).) Every such IEP must also include transition services to assist the child in reaching those postsecondary goals. (*Ibid.*)

17. "Transition services" means "a coordinated set of activities for an individual with exceptional needs" that: (1) is designed within a results-oriented process that is focused on improving the academic and functional achievement of the individual with exceptional needs to facilitate the movement of the pupil from school to post-school activities, including postsecondary education, vocational education, integrated employment, including supported employment, continuing and adult education, adult services, independent living, or community participation; (2) is based upon the individual needs of the pupil, taking into account the strengths, preferences, and interests of the pupil; and (3) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, if appropriate, acquisition of daily living skills and provision of a functional vocational evaluation. (20 U.S.C. § 1401(34); Ed. Code, § 56345.1,

subd. (a).) Transition services may consist of specially designed instruction or a designated instruction and service. (34 C.F.R. § 300.43(b); Ed. Code, § 56345.1, subd. (b).)

### *Substantive Requirements*

18. Under the IDEA and California law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) Special education is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).) Related services, known in California as designated instruction and services (DIS), are services which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).) Behavioral support, mental health services, and transportation are examples of related services. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a).)

19. In *Board of Educ. v. Rowley*, *supra*, the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Rowley*, *supra*, at p. 198.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950-953.) The Ninth Circuit has referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.2d 1141, 1149 (*Adams*).)

20. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley*, *supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. (*J.G. v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams*, *supra*, 195 F.3d at p. 1149.) In determining the validity of an IEP, a tribunal must focus on the placement offered by the school district, not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

### *LRE*

21. A school district must provide special education in the LRE. A special education student must be educated with nondisabled peers "to the maximum extent appropriate," and may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with

the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii).) LRE requirements apply to transitional placements. (*Letter to Spitzer-Resnick, Swedeen, and Pugh* (OSEP 2012) 59 IDELR 230.)

*Issue No. 2: Did the District's proposed annual goals, placement, and services contained in Student's February 15, 2012 IEP, offer Student a FAPE in the LRE such that District may implement them without Parent's consent?*

22. Based on Factual Findings 1-8 and 18-25 and Legal Conclusions 1 and 6-17, the District's proposed annual goals, placement and services contained in its IEP offer of February 15, 2012, offered Student a FAPE in the LRE and can be implemented without parental consent. The IEP team meeting at which those goals, placement and services were discussed and proposed was properly noticed and was attended by all required participants, including Parents and Student. The 2012 Decision established that the offer was not predetermined. Parents participated fully in the meeting and made their views known, and the District members of the IEP team considered their views. The offer of goals, placement and services was arrived at in compliance with all procedural requirements.<sup>16</sup> In the alternative, any procedural error was harmless because Parents were fixed on their desire to have Student reenrolled in FHS and unwilling to listen to any other proposal.

23. Based on Factual Findings 1-8 and 26-54 and Legal Conclusions 1 and 18-21, the District's proposed annual goals, placement and services contained in its IEP offer of February 15, 2012 addressed all of Student's needs to the extent they were discernible in the absence of current assessment data. The goals and objectives were measurable in light of the limited information available to the IEP team. The accommodations and modifications were sufficient, and the physical facilities of the ATP adequate for instruction in independent living skills. Student no longer needs related services in his IEP. Because the ATP maximized Student's exposure to nondisabled adults, it placed him in the LRE. The IEP was reasonably calculated to allow him to obtain a meaningful educational benefit.

#### *Termination of Special Education Obligation for Refusal to Allow Reassessment*

24. A school system obligated to provide special education under the IDEA is entitled to evaluation data that is current. (*Dubois v. Connecticut State Bd. of Educ.* (2d Cir. 1984) 727 F.2d 44, 48.) A parent who wants her child to receive special education under the IDEA must allow a district to reassess the child every three years. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315; see also *Johnson v. Duneland School Corp.* (7th Cir. 1996) 92 F.3d 554, 558; *Andress v. Cleveland Indep. School Dist.* (5th Cir. 1995) 64 F.3d 176, 178-179.) Repeated refusal by a parent to produce a child for reevaluation relieves the district of the obligation to reevaluate him. (34 C.F.R. § 300.300(c)(1)(iii); Ed. Code, § 56381, subd. (f)(3).)

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<sup>16</sup> This Decision does not address whether the District has complied with the IDEA since February 15, 2012.

25. If a parent refuses to consent to an initial evaluation, the school "shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child." (20 U.S.C. § 1414(a)(1)(D)(ii)(III)(aa); see also 34 C.F.R. § 300.300(c)(1)(ii).) There is no similar statutory provision concerning refusal to allow reevaluation. "Nonetheless, if a parent's actions are unreasonable or they frustrate the school's efforts [to reevaluate], the courts generally conclude that the school is not liable under IDEA." (*G.J. v. Muscogee County School Dist.* (M.D.Ga. 2010) 704 F.Supp.2d 1299, 1309 fn. 9.)

*Issue No. 3: May the District terminate the provision of Student's special education and related services as provided in his October/November 2007 IEP due to Parent's failure to allow Student to attend the ATP?*

26. Based on Factual Findings 1-8 and 55-59 and Legal Conclusions 1 and 24-25, the District is not entitled to an order relieving it of special education responsibility for Student simply because Parents did not agree to its IEP offer. However, if Parents do not cooperate with the triennial assessment that this Decision orders, the District will be relieved, without further order of an ALJ, of any further obligation to provide special education and related services to Student. For years Parents have unreasonably and actively obstructed and failed to cooperate with the District in the performance of its duties under the IDEA, including its duty to reassess Student every three years. Should Parents disobey the Order made here requiring their cooperation in the triennial assessment process, that disobedience will constitute a waiver of Student's right to special education and related services from the District.

## ORDER

1. The District may reevaluate Student pursuant to its February 15, 2012 triennial reassessment plan without parental consent.

2. Parents shall cooperate unconditionally and in good faith with the reassessment process. Their cooperation shall include but not be limited to the following:

a. Within 30 days of the date of this order, Parents shall contact the District's Legal Compliance Coordinator (at present Ms. Clark-Fleming) and cooperate in scheduling dates and times for the conduct of Student's triennial assessment, which shall occur at the ATP at IMC.

b. If Parents and the District cannot agree on dates and times for the conduct of Student's triennial assessment, the District shall give Parents 14 days' written notice of the date, time, and place of each event in the triennial assessment, and Parents shall make Student available at those dates, times, and places for assessment. Parents shall not be present during the assessments.

c. Parents shall promptly complete any forms, scales, questionnaires or other documents that are part of the District's triennial evaluation and return them to the District no later than 14 days after receiving them. Parents shall also provide all written consents reasonably necessary to allow the District to have access to medical and other information about Student in the possession of third parties, within 14 days after receiving the District's requests for such consent.

d. Written notification by the District sent by first class United States Mail to Parents' address as stated on their pleadings in this proceeding shall constitute sufficient notification to Parents under this Order, unless Parents advise the District in writing of a change of address. The District need not use certified mail or obtain signatures from Parents acknowledging receipt.

e. Parents shall not impose conditions on, obstruct or interfere with the triennial reassessment in any way.

3. If Parents fail to cooperate with the triennial reassessment process as required by section 2 of this Order, the District may, upon prior written notice to Parents and without further order of an ALJ, terminate its delivery of special education and related services to Student. That duty shall only be revived if Parents unconditionally request a triennial reevaluation pursuant to the February 15, 2012 reassessment plan, cooperate with the process as required by section 2 of this Order, and permit the triennial assessment to be completed. In that event Student shall continue to receive, as compensatory education, special education and related services until his 23d birthday as ordered in the 2012 Decision.

4. The District's proposed annual goals, placement and services contained in its IEP offer of February 15, 2012 constitute the offer of a FAPE in the LRE, and the District may implement them without parental consent. The District is relieved of any further obligation under the 2012 Decision to provide related services to Student as required by his 2007 IEP.

5. This Order is effective immediately.

#### PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing Decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, the District prevailed in full on issues 1 and 2, and in part on issue 3.

## RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a state or federal court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

Dated: May 22, 2013

\_\_\_\_\_/s/\_\_\_\_\_  
CHARLES MARSON  
Administrative Law Judge  
Office of Administrative Hearings